STATE OF MICHIGAN
IN THE SUPREME COURT

MARYANN DONOHO,
Plaintiff-Appellee,

SC: 127537
COA: 256525
WCAC:03-000235

v

WALMART STORES, INC. and INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA

Defendant-Appellants.


NEAL, NEAL & STEWART, P.C.
DAVID M. STEWART P31755
Attorney for Plaintiff-Appellee
142 W. Second St., Ste. 102
Flint, Michigan 48502
(810) 767-8800

SMITH HAUGHEY RICE & ROEGGE
JON D. VANDER PLOEG P24727
Attorney for Defendant-Appellant
250 Monroe Avenue
200 Calder Plaza Building
Grand Rapids, Michigan 49503-2251
(616) 774-8000


127537

**PLAINTIFF'S SUPPLEMENTAL BRIEF**

## INDEX OF AUTHORITIES

## ARGUMENT

This case presents an issue of statutory construction. In such a case the court endeavors to ascertain the legislative intent that may reasonably be inferred from the statutory language itself. *Sotelo v Grant Twp.*, 470 Mich 95, 100 (2004). In reviewing the statute's language, every word should be given meaning, and the court avoids a construction that would render any part of the statute surplusage or nugatory. *Koontz v Ameritech Servs*, 466 Mich 304, 312 (2002). To ascertain the meaning of a statute, the court may utilize the doctrine of *noscitur a sociis*, i.e., "a word or phrase is given meaning by its context or setting," *G.C. Timmis & Co. v. Guardian Alarm Co.*, 468 Mich 416, 420 (2003).

Section 315(1) of the Workers' Compensation Act, MCL 418.315, is concerned with the medical benefit (generically described) aspect of worker's compensation. The first 8 sentences of this section define and delimit the employer's duty to provide medical services to an employee who is injured in the course of employment. The two final sentences of this section, sentences 9 and 10, explain what occurs if the employer, for any reason, fails to fulfill that duty. Sentence 9 explains, simply, that the magistrate may order the employer to reimburse the employee for expenses the employee has paid, or, alternatively, to pay the providers for unpaid expenses. Sentence 10, the final sentence in this subsection, empowers the magistrate to prorate attorney fees at the contingent fee rate paid by the employee. The power of the magistrate to prorate attorney fees arises under this section when the employer is ordered to pay for medical services which, in breach of its duty, it has failed to provide to an injured employee. This subsection does not specifically state among whom the magistrate may prorate attorney fees. There are only two possibilities: the employer who breached its duty to provide medical care or the person or entity that provided health care to the injured employee.

As the law presently stands, the attorney fee cannot be prorated between plaintiff and the health care provider. The Court of Appeals has said this on a number of occasions, most anciently in *Boyce v Grand Rapids Asphalt Paving Co.*, 117 Mich App 546, 549-550 (1982):

> We summarily reject plaintiff's argument that the defendant hospital should be responsible for the payment of plaintiff's counsel's fees. The controlling principle of law is well stated by the authors of 7 Am Jur 2d, Attorneys at Law, § 238, pp 277-278:
>
> "The creation of the relation of attorney and client by contract, express or implied, is essential to the right of an attorney to recover compensation for services. In general, there can be no recovery from one who did not employ or authorize employment of the attorney, however valuable the result of the attorney's services may have been." (Footnotes omitted.)
>
> Where one of several persons, all of whom are equally interested in the results of a suit, employs an attorney to conduct the case for him and the benefit of the attorney's services from the nature of the case extends to all interested parties, the other parties do not, merely by accepting the benefits of the attorney's services without objection, become liable for the attorney's fees. See Stewart v Auditor General, 280 Mich 272; 273 NW 566 (1937). Accordingly, the appeal board correctly ruled that the defendant hospital is not responsible for paying any portion of the attorney fees owed to plaintiff's counsel for his services.

See also *Duran v. Sollitt Constr. Co.*, 135 Mich. App. 610, 613 (1984) and *Macomb County Taxpayers Ass'n v. L'Anse Creuse Pub. Sch.*, 213 Mich App 71, 79 (1995), aff'd in part and reversed in part on other grounds at 455 Mich 1 (1997)

The only remaining party with whom the attorney fee may be prorated is defendant (and its carrier). This entire subsection, MCL 418.315(1) deals solely with the nature and extent of the rights of the employee and the duties of the employer with regard to medical benefits. The immediately preceding sentence describes the consequence of the employer's failure, neglect or refusal to pay the injured employee's work-injury-related health care expenses. It is logical, therefore, to conclude that attorney fees for the case may be prorated between the employee and the employer, the employer being responsible for attorney fees incurred in securing an award of medical benefits it had the duty to, but failed to provide. This is how this section has been understood and applied historically by

the Court of Appeals and by the Workers Compensation Appellate Commission. See *Boyce v Grand Rapids*, supra; *Watkins v Chrysler Corp.* 167 Mich App 122, 132 (1988); *Nezdropa v. Wayne County*, 152 Mich App 451, 467-468(1986); *Naebeck v Kroger*, 2002 ACO #211; *Baker v Penzco Die Casting Corp.*, 2000 ACO #449; *Laurie v Univ. of Michigan*, 1993 ACO #394.

So that the language of the statute is not mere surplusage or meaningless, the attorney fee must be apportioned either to the health care provider or to the employer/defendant. Interpreting the last sentence of section 315 in context and applying longstanding law, the attorney fee is properly awarded against the employer.

Neal, Neal, & Stewart, P.C.

Dated: July 21, 2005

Richard C. Hohenstein P33808
Attorneys for Plaintiff